

PARLIAMENT AND SCOTTISH MORAL LEGISLATION IN THE 1970s

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The aim of this article will be to examine the politics of Scottish Law reform and to explore the 'Scottish dimension' in certain areas of legislation which have involved morality and conscience. Specifically, attention will be focused upon three Scottish 'issues of conscience' of the 1970s – the Licensing (Scotland) Act 1976, the Divorce (Scotland) Act 1976 and the 'non-reform' in Scotland throughout the seventies of the law pertaining to homosexual conduct in private between consenting adults. Each of these issues, because of distinctive legal and cultural traditions, required separate Scottish legislation. Hence, they offer an interesting insight into the variations that can exist in policy and in the policy process for Scotland as compared to England and Wales.

I. A Scottish Perspective

To understand fully the 'Scottish dimension' in contemporary political issues one must first understand Scotland's unusual historical development. While part of a unitary British state, Scotland also enjoys a strong sense of national identity which derives partly from the long history of Scotland's existence as an independent nation-state before the Union with England and partly from the fact that many Scottish institutions have remained intact and distinctive since the union. Although the Scottish Parliament was abolished with the Treaty of Union in 1707, Scotland did retain a number of its key institutions. The Scottish legal system was preserved maintaining differences in law between the two countries. The Scottish education system was also retained with its separate principles, as was the Presbyterian Church of Scotland and the Scottish local government system. Moreover, in the years following the Union Scotland gained further autonomous institutions. The growth of government responsibility and the steady rise of nationalist sentiment in the latter half of the 19th century saw the creation of the Scottish Office in 1885 and the introduction of the Scottish Grand Committee in 1894.

These institutions, then, have helped to preserve some of the distinctions between Scottish and English society and to maintain a clear sense of national self-consciousness in Scotland. They became 'the transmitters of Scottish national identity from one generation to the next'.⁽¹⁾ That Scotland has its own institutions is a commonly accepted proposition. The question arises, however, as to how these institutions may

be understood to relate to the British political system.

According to Tom Nairn the political assimilation of the Scottish state, in conjunction with the preservation of Scottish 'civil society' created a distorted 'cultural sub-nationalism'.⁽²⁾ The ingenuity of Nairn's analysis lies in his adoption of a Gramscian framework which attempts to utilise the concept of 'civil society' in a Scottish historical setting. Here a distinction is drawn between the State, i.e. the political and administrative structure, and 'civil society' characterised by society's non-political organisations, its religious beliefs, its culture and customs, and its way of life generally. Scotland's eccentricity lies in the fact that, apart from the State itself, 'civil society' was guaranteed its independent existence by the Union of 1707. So all the institutions aforementioned – church, law, education, royal burghs – and the dominant social classes linked to them were safeguarded, as was the dominant social culture they represented. The Scottish pattern of development, then, was of a distinct civil society not fully married to its State. Scotland was a nationality which resigned statehood but preserved an extraordinary amount of the institutional and psychological baggage normally associated with independence – a decapitated nation state, as it were, rather than an ordinary "assimilated" nation.⁽³⁾

Under such conditions Scotland was 'stranded'. It was too much of a nation to become a mere province; yet it was unable via nationalism to develop as a nation-state in its own right. Cultural repercussions arising from such an anomalous situation were inevitable. An anomalous historical situation could not engender a 'normal' national cultural evolution; instead it produced a stunted caricature of it in the form of a 'cultural sub-nationalism'. This manifests itself in many ways in modern Scotland – in the role of the Church, in 'Kailyard' literature, in military traditions, and in the popular obsession with sport, especially football. As Nairn, notes graphically – 'the popular consciousness of separate identity, uncultivated by "national" experience or culture in the usual sense, has become curiously fixed or fossilised on the level of the image d'Epinal and Auld Lang Syne, of the Scott Monument, Andy Stewart and the "Sunday Post", – to the point of forming a huge, virtually self-contained universe of Kitsch'.⁽⁴⁾

The peculiar position of Scottish civil society, then, too developed and too distinct to be assimilated, yet no longer requiring to form a State of its own, has led to a series of developmental oddities. Here Christopher Smout observes the paradox:

'The history of the Union enshrines the continuing central paradox of

the Scottish identity. It bears witness to the survival of an elemental nationalist consciousness that Scotland is not England; and on the other hand it carries the apparently opposing consciousness that Scotland and England are linked within a national British entity'.⁽⁵⁾

Thus, Scottish development has been a case of assimilation in politics but separation in social mores. While Scottish society by virtue of its anomalous mode of development can be said to possess a distinctive political culture, can it also be said to manifest, as James Kellas would argue, a distinctive political system?

The issue which is at the heart of the matter in the Scottish context is the question of system survival.⁽⁶⁾ It is important here to consider a distinction between system-maintenance (maintenance of a *particular* kind of political system) and system-persistence (persistence of *some* kind of political system).⁽⁷⁾ Suffice to suggest at this stage that while the *particular* pre-1707 Scottish political system failed to be *maintained* by the Treaty of Union, an argument can be made that a political system of *some* kind did *persist* post-1707, given that the bulk of Scottish society remained intact as a result of the process of assimilation discussed above. This, of course, begs the question, what kind of political system?

A political system 'is capable of identification from actions, roles and institutions appertaining to goal attainment'.⁽⁸⁾ This comment from Nettl is fine in as far as it goes, but what has to be remembered in the Scottish context is the dualism subsumed in goal attainment, that is in some instances goals will be predominantly Scottish, while in others they will be predominantly British. As Kellas has pointed out the Scottish 'political system' acts as a means of communication with the larger British system, as well as being a communications and decision-making network within Scotland itself in those areas of politics where British interests are not so involved. The concept of a 'political system' as applied to Scotland must, therefore, take account of these two 'activity areas' – the Scottish and the British. The Scottish system can thus be viewed as being both dependent and independent within the British system. Michael Keating has emphasised this point:

'The Scottish political system is both dependent and independent within the British system and can at one time be regarded as a sub-system of the Scottish social system and, therefore, a political system in its own right (as when legislation concerning Scots law or local government is being enacted) and at another time as a sub-system of the British political system (as when UK legislation is being modified

to suit Scottish conditions, or demands are being made upon the UK system). No clear model then exists to which the Scottish political system conforms and the system is indeed unique in trying to provide for the maximum degree of autonomy within a unitary state and Parliament'.⁽⁹⁾

The problem, however, is that of defining the boundary between the systems since it is not always clear whether it is the British system or the Scottish system which is determining policies for Scotland. For instance, even in areas of administrative autonomy there is some need to conform with the corresponding policies in England. It is not possible, therefore, for Scotland to diverge too far from the norms established in the rest of Britain. For instance, while moral issues are matters largely for debate within the Scottish 'political system', the boundary between the Scottish and British system breaks down to some extent through 'the awareness of English practices, the increasing assimilation of Scottish society to that of England, and the desire in Great Britain to establish "equal rights" for all citizens'.⁽¹⁰⁾

The case studies to be examined here on Scottish 'issues of conscience' – licensing, divorce and homosexuality – illustrate these particular dilemmas. Being issues which require separate legislation pertaining only to Scotland they highlight the way in which the Scottish 'political system' can operate in an independent capacity. Yet, they also serve to demonstrate that even when operating in this 'independent' capacity the Scottish 'political system' is often dependent upon the larger British political system at critical moments in the policy process. Thus, in order to understand the development of policy in the areas in question one has to disaggregate the Scottish political system and explore the interactions of some of the actors and organisations involved.

Of course, Parliament itself highlights this interaction between the Scottish and British systems. A distinctive legislative procedure exists for Scottish Bills involving the Scottish Grand Committee (for general and second reading debates) and the First and Second Scottish Standing Committees (for detailed scrutiny of legislation). In addition a Select Committee on Scottish Affairs has investigatory powers to scrutinise any aspect of Scottish business through public examination of witnesses and documents. But the division between Scottish and British business is not as clear cut as might first appear since Scottish business often has to compete for parliamentary time on the floor of the House as a whole and this can lead to frustrating bottlenecks.

Pressure group activity is another area where an interaction between

the two systems is to be found. On certain matters pressure groups will choose to make representations at a UK level directly into the British political system while on others, especially those only relevant to Scotland, representations will fall largely within the sphere of the Scottish political system with pressure being focused on the Scottish Office. The Scottish Office, then, is of particular significance in the Scottish 'political system'. It can, because of its position, influence and control the political demands made upon the system in such a way as to affect both the formulation and implementation of policy. This control does not necessarily have to be overt but can be circumstantial in that administrative 'style' can influence policy output. Hence the values of those in power can be influential in the setting of priorities and can have a significant bearing on the types of issue which emerge, and indeed do not emerge, onto the political agenda for consideration and public discussion.

II. Approaches to Policy Analysis

In explaining policy development in the case studies, the approach adopted here is based on the notion that the making of policy is both an intellectual activity and an institutional process. Decisions that influence policy are the products of individual minds in so far as problems must be perceived and defined by individual policy-makers. New policies can then be created on the basis of those perceptions. Yet the making of public policy is also an institutional process whereby policy-makers possess authority to resolve public issues only by virtue of their positions in political institutions. Policy often does change in response to shifting intellectual currents, but institutional realities can impinge upon the extent to which new ideas penetrate the political world and influence public policy. Thus, policy innovations can also be the outcome of political conflict and of bargains struck between established political interests.

One idea which is gaining increasing popularity in much of the newer policy literature is that more than a single account is required to describe all the different aspects of policy-making and organisational life. Thus, it may be that a combination of approaches is better utilised to explain policy developments. Richard Simeon, for instance, contends that 'no one single clear and simple explanation of something as many faceted and as huge as modern government is likely to be possible'.⁽¹¹⁾ This is echoed by Keith Banting who similarly argues that 'our understanding of policy determinants can be refined further by abandoning the assumption that there is a single "policy process" operating identically throughout an individual policy change and over all policies'.⁽¹²⁾ By adopting a variety of approaches to deal with the complexity of the policy process one can

incorporate such concepts as systems analysis, group theory, demand regulation, agenda management, 'non-decision-making', and value judgements in explaining policy formulation

What is of interest to us is identifying the balance of forces which prevailed in the different phases and different types of policy which are to be examined. By looking at the issues from the perspective of group theory and demand regulation it is possible to see how the 'package' of interests associated with a particular policy option can affect whether the option is adopted or rejected. Moreover, various 'rules of the game' emerge to govern the relationship between organisations and the bureaucracy and to regulate demands. Being in a pivotal position in the channel of communications, the bureaucracy has the power to influence inputs into the policy process and to set the political agenda. And in understanding why some issues emerge on to the political agenda it is also important to consider why certain issues do not emerge. In this capacity the concept of 'non-decision-making', although not without its difficulties and dangers, can be usefully employed to help reveal some of the more covert aspects of politics and can help to provide a focus on values in problem identification and definition. As W I Jenkins has pointed out – 'non-issues, non-decisions and even non-policies are necessary and legitimate subjects for examination'.⁽¹³⁾

Since what you see depends on where you are and which way you are looking this combination of approaches provides a means by which to disaggregate and explore some of the component parts of the Scottish 'political system' as they manifest themselves in the studies. Although Scotland has the administrative capacity to initiate distinctive policies the achievement in terms of substantive policy appears to be modest. The studies here – on licensing, divorce and homosexuality – will consider to what extent this is true for 'issues of conscience'. While perhaps not wholly typical of independent Scottish policy formulation, the cases, because they reputedly fall within the Scottish 'political system', nevertheless offer a chance to explore, as compared with the rest of Britain, what, if any, variations exist in the substantive policy areas under consideration and in the political and administrative processes by which those policies came to be formulated. Further, since each of the measures gave rise to divisions in which MPs were free to vote according to individual conscience rather than by Party Whip, they provide some insight into the social and moral attitudes which prevailed in Scottish politics at the time.

At this juncture it may be worth reiterating, and indeed emphasising, that in examining Parliament's handling of these moral issues, we may not

necessarily be witnessing Parliament's *typical* role in policy formulation. For the most part Parliament's typical role is restricted, the bulk of policies appearing before it as 'fait accomplis' having been formulated by the Executive, its bureaucracy and inner elites. Only when a broader societal consensus is required does Parliament begin to be able to influence the shape of policy. That said however, there has been in recent years considerable debate over the changing role of Parliament.

At one end of the spectrum is the argument put forward by Douglas Ashford.⁽¹⁴⁾ This points to the primacy of the Executive and its bureaucracy in the formulation of policy. The increased importance of the government as a regulatory economic force, the tendency towards corporate decision-making and the increased complexity of the entire structure of government have led to the decline in importance of direct democratic control through Parliament. The unique characteristic of the British political system according to Ashford is the high premium placed on adversarial behaviour at the uppermost levels of decision-making. Not only has the Opposition few ways to intervene in policy choices but even the backbench supporters of the governing majority in Parliament are to a great extent excluded from policy making. In Ashford's view 'Parliament can do little more than cope with the consequences of policy-making as eventually perceived by the public'.⁽¹⁵⁾

At the other end of the spectrum lies Philip Norton's view.⁽¹⁶⁾ Norton is critical of the widespread conception of the House of Commons as a body that provides unquestioning assent for the decisions of government. Further, he questions the idea that the initiation and formulation of legislation is something largely, if not almost exclusively, undertaken by government. While this may have been true for a good part of the 20th century it is not, in Norton's eyes, really applicable to the politics of the 1970s and early 1980s which seem to have been of a rather different character.

Various proposals for parliamentary reform originated in the 1960s and were advanced in an attempt to make effective Parliament's function of scrutiny and influence. These were based on 'the perceived lowly and inadequate role played by the Commons in the political process' and aimed to make internal changes to the workings of Parliament.⁽¹⁷⁾ However, by the 1970s there was marked dissatisfaction with this limited internal approach and as a result the pressure for reform became far more reaching. This pressure was exacerbated by the indecisiveness of the 1974 General Elections.

Norton's view emphasises the 'importance of attitudes within Parliament, and the potential and actual power available already to Members, as the basis on which the Commons might achieve an effective role of scrutiny and influence'.⁽¹⁸⁾ This idea draws on the experience of parliamentary behaviour in the 1970s which does reveal MPs increased willingness to dissent against the Government line. Government backbenchers, under both Conservative and Labour administrations, proved willing to enter Opposition lobbies to impose defeats on their own front bench. And as the decade progressed, the greater was the awareness on the part of Members of what they could achieve. So much so in fact, that one irony is that had it not been for dissent in the 1974-79 Parliament by a number of Labour Members, Britain would now possess a new constitutional framework involving a devolved Scottish Assembly. Thus, despite the disparagement of Parliament, Norton argues that the House of Commons can and does have a role to play in the political process and that the key to more effective scrutiny and influence lies with MPs themselves.

There exist, then these differing conceptions of the role of Parliament and this can give rise to ambiguity and confusion concerning its functions of scrutiny and influence over policy. That it has ceased to form a *regular* part of the decision-making process, however, is readily conceded even by Norton. Nevertheless, he identified it 'as occupying an unusual place in the British political process, having an important relationship with, yet not being a major part of, the decision-making process'.⁽¹⁹⁾ It is the nature of this (unusual) relationship which will be explored further in the case studies.

III. The Case Studies

a) Licensing Law Reform

A typical manifestation of the 'cultural neurosis' referred to earlier is the attitude in Scotland towards the use and consumption of alcohol. The nature of the problem arises from the ambivalent attitude which Scots hold towards drink. Studies have shown that various ethnic groups exhibit different rates of alcoholism and drinking pathologies.⁽²⁰⁾ The attempts to explain these differences are many and varied, but one of the main explanations put forward is the cultural one. This perspective stresses the social meaning and function of alcohol, drinking and drunkenness and describes how different patterns of alcohol use have emerged in different societies. In this respect Scotland is classified as a 'ambivalent culture', where attitudes to the use of alcohol are contradictory in that there are two directly opposed value systems in relation to the use of alcohol operating in

Scottish culture at the same time.⁽²¹⁾

The source of this confusion and the reason for the existence of two simultaneous but contradictory attitudes is that alcohol has a double identity. It is both a drug and a symbol and it is when the drug effects of alcohol are at variance with its presumed symbolic function that problems relating to its use and abuse arise. The myths which surround alcohol are many – myths of toughness, of maturity, of sophistication, of sexuality. These are manifestations of a set of deep-rooted symbolic values which have grown and developed in Scotland over centuries. However, competing against these myths has been a strong Calvinist anti-drink tradition expressed in the history of the evangelical temperance movements. These temperance leagues warned of the evils of drink and offered salvation through strict adherence to abstinence, Protestantism, the Sabbath and the Scottish family way of life. The product of this history of ambivalence is the disproportionately high incidence of alcohol-related problems in modern Scotland.

The Scottish Health Education Group has suggested that alcohol consumption rates tend to be particularly high where there is social pressure to drink; inconsistent or non-existent social sanctions against excessive drinking; drinking outside a family or religious setting; and ambivalence towards moderate drinking. It comments:

'All those conditions are fulfilled in Scotland today. When they are viewed in the context of a rigorously enforced Protestant ethic, a fierce and sometimes embittered patriotism and a comparatively inimical climate, it is easy to see how the functional aspects of drinking behaviour have become unextricably tangled with a host of compensatory and guilt-provoking feelings. These have acquired separate symbolic associations and have served to make drinking an activity qualitatively of considerable importance to the self-esteem of the individual and of the nation'.⁽²²⁾

It was in such a context that the Clayson Committee was appointed in 1970 to review the liquor licensing laws and to recommend what changes might be made in the public interest. The Committee's approach was developed from a three-fold analysis of the controls available to prevent the misuse of alcohol. These controls were categorised as social, fiscal and legislative. While acknowledging that such controls were inter-related the Clayson Report was led to comment that 'in present Scottish circumstances it is in the area of social controls over drinking practice that improvement is most required if the serious problem of alcohol misuse is to

be ameliorated'.⁽²³⁾ To this end the role of licensing was to strengthen social controls 'by helping in the formation of public attitudes to alcohol and modifications of practice in its use'.⁽²⁴⁾

Understandably, the Clayson recommendations which attracted most public attention were those concerned with permitted hours of opening. In keeping with its commitment to liberalisation the Committee recommended opening hours of 11 a.m. to 11 p.m. weekdays and 12.30 p.m. to 11 p.m. Sundays, with Sunday opening being extended to public houses. Reaching this decision involved compromising between various pressure group demands. On the one hand a minority of groups including the Church of Scotland argued that the law should further restrict the distribution and availability of alcohol. On the other, a majority, including those such as the Scottish Tourist Board, the Brewers Association of Scotland and the Association of Chief Police Officers (Scotland), favoured relaxation although views differed quite markedly as to how far and in what way permitted hours should be extended.

After a period of formal consultation between the Government and interested parties on the content of a Report, it is ultimately the Government which decides the Report's fate. Thus, in the same way as the Committee acted as a regulator of demands in producing the Report, the Report itself became the object of demand regulation as it competed for attention and a place on the political agenda. Published in August 1973, the Clayson Report eventually came up for debate in the Scottish Grand Committee in April 1975. This was followed later in the year with a Government commitment to legislate on licensing. However, the proposed legislation announced by the then Secretary of State for Scotland, Willie Ross, in October 1975 differed in some important respects from the recommendations made by Dr Clayson. For instance, although there was an endorsement of the extension of hours to 11 p.m. there was considerable divergence on a number of issues with no opening of public houses on a Sunday, retention of the statutory afternoon break and the closing of off-sales at 8 p.m.

Once the commitment to legislate was announced pressure group activity on the licensing issue picked up. Perhaps the strangest example of lobbying came from the Strathclyde Licensed Trade Association, who for some bizarre reason saw fit to lobby both the Government and the Opposition with contrary proposals. Also there was an instance of some rather unsophisticated lobbying by a commercial off-sales organisation on the subject of opening hours which amounted to little more than a crude attempt at political blackmail. And there was the example of ineffectual

late lobbying by the Church of Scotland when it only made its representations on Sunday opening of pubs *after* the decision to open had been taken by Parliament. Obviously, the effect different pressure groups had on individual decisions varied but a particularly important factor in determining a group's influence appeared to be its social standing and political weight within the community since such status facilitated participation in the consultation process.

While licensing was a Government provision it was also allowed a free vote. In parliamentary terms this is a rather unusual combination. Unlike the majority of other issues involving free votes, it did not have to compete in the lottery for Private Members' time. The guarantee of time for adequate debate gave the measure a distinct advantage in completing its legislative passage. Also the use of the Scottish Grand Committee at critical points in its development assisted the licensing reform onto the statute book. For instance, the Scottish Grand Committee provided a useful forum for debating the general principles of the Clayson Report helping to keep the issue to the fore and acting as a sounding board for Scottish parliamentary opinion. Again, the use of the Scottish Grand Committee to take the Second Reading of the Licensing Bill in 1976 further facilitated its passage by removing it from the crowded timetable on the Floor of the House.

The passage of the licensing legislation through Parliament generated a number of novel cross-party alliances between individual MPs. Imagine for instance, Teddy Taylor (Conservative), Donald Stewart (SNP), David Steel (Liberal), and Willie Ross (Labour) all voting on the same side against the Sunday opening of pubs. Or George Younger and Alex Fletcher (both Conservative) voting with Dennis Canavan and Neil Carmichael (both Labour) in favour of Sunday opening. Parliament and individual MPs, then, had a rather more important role to play in deciding upon policy options than the 'rubber stamp' role with which they are usually associated when party political matters involving the Whips are concerned. Several MPs made influential contributions which affected the outcome of particular decisions. For example, Malcolm Rifkind's eloquent argument in favour of the Sunday opening of pubs was of considerable importance in getting that amendment carried. Also, Dennis Canavan and Michael Clark Hutchison featured prominently in the campaign to reverse the decision to allow the police unrestricted entry to private clubs. And the influential contributions from the late J P Mackintosh were of immense importance in setting the tone and widening the parameters of the debate. In short, these men and their arguments prevailed because they best reflected the changing popular mood of Scotland. The Scots were tired of being what

they perceived to be second-class citizens. They were, after all, asking for no more than England already possessed. Scotland was in a vibrant, energetic and expectant mood in the mid-1970s. The prospect of devolution and an Assembly lay ahead. That the Scots were no longer prepared to tolerate the Calvinist orthodoxy towards drink was just one more manifestation of a growing (albeit short-lived) self-assurance.

b) Divorce Law Reform

Divorce reform is another issue which has to be viewed in the context of the political climate in Scotland in the 1970s and also in the context of Scottish history. It has already been noted that after the Union of 1707, Scotland not only retained distinctions in certain areas of law but also preserved some of the differences in social mores. The divorce issue highlights these differences yet at the same time illustrates the duality in Scottish politics of being both dependent and independent within the British system.

The parameters of the divorce debate were very much set by the events in England. The appearance of the Church of England's 'Putting Asunder' in 1966 and the Law Commission's review 'The Field of Choice' set out the main options for consideration.⁽²⁵⁾ The following year the Scottish Law Commission's 'Divorce: The Grounds Considered' more or less adopted the same recommendations, revising them only to meet the requirements of Scots Law.⁽²⁶⁾ Briefly, the Scottish Law Commission argued that divorce should not be regarded as a punitive measure, but rather as a recognition that a marriage was dead and ought to be buried with the minimum of embarrassment, humiliation and bitterness. A marriage was to be judged at an end when it had irretrievably broken down and it was enough that one partner maintained irretrievable breakdown for the breakdown to be a fact. Divorce was to be granted upon proof of one of several grounds including the new ground of separation, where divorce would be available after a period of two years' separation when both spouses consented, or after a period of five years when one spouse objected, subject to certain safeguards. However, the most radical proposals of all came from the Church of Scotland in 1968.⁽²⁷⁾ The Church agreed that divorce should be granted on the irretrievable breakdown of marriage, but argued that separation for a continuous period of two years, consequent upon a decision of at least one of the parties not to live with the other, should act as the sole evidence of marriage breakdown.

While south of the border the Church of England and the Law Commission were able to find common ground and work out a set of

compromise recommendations which were eventually to form the basis of the reformed English law, the Church of Scotland and the Scottish Law Commission found it much more difficult to reach this common position. The result was that while both the Church of Scotland and the Scottish Law Commission, and indeed the Law Society of Scotland and the Faculty of Advocates, favoured reform, none could agree which type of reform would be most appropriate. With no common ground there was a lack of unified (or uniform) pressure for change throughout the first half of the seventies. And of course the Roman Catholic Church in Scotland, because of its doctrinal teachings, was single minded in its opposition to any proposed reform. This influence seems to have had an effect on at least some MPs.

The attitudes of different Labour and Conservative administrations were also of particular importance to the success or failure of the various reform attempts. There is no doubt whatsoever that the allocation of parliamentary time to the English Divorce Reform Bill in the 1968-69 Session was crucial to the success of that provision. This was a feature of the 1966-70 Labour administration which gave additional time to other Private Members' Bills considered to merit fuller public debate than Private Members' business allowed. The liberal attitudes of the Home Secretary of the period, Roy Jenkins, and the Government Chief Whip, John Silken, had much to do with this generosity. In stark contrast the 1970-74 Conservative government made it known that Private Members' legislation would have to stand or fall on its own merits since no extra parliamentary time would be forthcoming, irrespective of the perceived importance of the issue. And this stance was maintained by Labour's Willie Ross when he returned to head the Scottish Office in 1974.

Since divorce was a subject for Private Members' legislation, the role of individual MPs was again of paramount importance. Without any doubt the most influential MP in the English divorce reform was Leo Abse. He was the one who rekindled the debate in the early sixties, later persuaded first William Wilson and then Alec Jones to promote Private Member's Bills and who cajoled the Labour Cabinet (through Jenkins and Silkin) into granting additional parliamentary time for debate. In the protracted struggle for Scottish reform (there were seven attempts in all) a number of Scots MPs featured prominently. Donald Dewar, Robert Hughes, Willie Hamilton and Robin Cook were all active in urging divorce reform in the early and mid-seventies. However, the most influential figure in the Scottish divorce issue did not reside in the ranks of the supporters of reform, but in the opposing ranks. Tam Galbraith single-handedly opposed the progress of a number of Divorce Bills on countless occasions. Ironically, his dogged opposition may have had the reverse effect from that

intended – by focusing public opinion on the need for reform he may have unwittingly become the catalyst for its eventual success.

Of course, public interest in a Bill can affect its chances of success. In the case of Scottish divorce reform public opinion and its influence was open to varying interpretations. On the one hand, some MPs felt that the fact that a Bill had been introduced in virtually every Parliamentary Session of the first half of the 1970s was indicative of a public desire for reform; whereas on the other, opposing feeling was that the continued *failure* of Private Members' legislation was an indication that opinion was against it. Needless to say those who adopted the former position tended to support reform while those who favoured the latter interpretation were inclined to oppose it. Thus, what MPs thought about public opinion on the divorce issue depended a great deal on their own values and beliefs and on *who* they took to *represent* public opinion. As Hall *et al* have noted – 'assumptions about the pervasiveness of certain public values and beliefs are moulded by the values and beliefs of those who do the judging, as well as by the sources from which they obtain their information'.⁽²⁸⁾ The tendency therefore, was for MPs to quote that section of public opinion which did most to support their personal predilections. That is why, during the debates, there was such confusion as to the state of Scottish public opinion, because very often MPs would be using different sources and talking at cross purposes.

While there were clear differences in the way in which the divorce reforms were enacted north and south of the border, the differences in policy content, at least in terms of the general principles, were not so obvious. What differences did exist lay largely in the technical and legal requirements of Scots Law. The Scottish divorce reform then was very much influenced by the norms which already prevailed south of the border. Separate Scottish laws may engender separate politics and administration, but they need not always engender separate policies. Yet, the swing in popular and parliamentary opinion and the acceptance of divorce reform resulted from changing social and political circumstances which effectively increased native awareness of Scotland's perceived 'disadvantages'. A sense of injustice developed in the mid-1970s concerning both the nature of the reform and the procedure available to obtain it. Not only was it a case of Scotland not having as liberal a law as prevailed in England, it was also another manifestation of the wider search for a Scottish identity, political and otherwise. Scottish business in Parliament was being brought into question as part of the much broader debate on constitutional reform.

c) Homosexual Law Reform

The issue of homosexuality and the 'non-reform' of the law in Scotland throughout the seventies is another case which has to be viewed in the wider context of Scottish history and politics. Again it is a case which highlights Scotland's need for certain types of legislation to be framed separately in the idiom of Scots Law; illustrates the way in which social mores can vary north and south of the border; and demonstrates Scotland's dualism within the British political system by acting dependently in attempting to obtain a legislative reform but independently in its administrative interpretation and implementation of the prevailing law.

As with divorce, the original pressures for homosexual law reform emanated from England. It was the Church of England in conjunction with the Howard League for Penal Reform which initiated the setting up of the Wolfenden Committee and it was this Report which set the tone of the debate in the late fifties and the sixties.⁽²⁹⁾ The central recommendation of Wolfenden was that homosexual acts between consenting male adults in private should be decriminalised. This liberalising recommendation, however, was not particularly well received north of the border. A deliverance of the General Assembly of the Church of Scotland in 1958 came out firmly against any revision of the homosexuality laws, and this remained the Church's policy for the next ten years until 1968. It was not in fact until after the success in England of Leo Abse's Sexual Offences Act in 1967 that the Church of Scotland was forced to completely revise its thinking on the homosexuality issue. Thereafter, some tentative liberal pressure for reform began to emerge in Scotland with the establishment of the Scottish Minorities Group in 1969. Set up with the aim of promoting social and legal equality for homosexuals, it was this pressure group which was at the forefront of the campaign for reform throughout the 1970s. The problem of overcoming public opinion apart, the SMG's main obstacle to achieving a legislative reform of the law in Parliament was the Lord Advocate's policy of 'no prosecutions'.

It was Wolfenden which identified the lower rate of prosecutions in Scotland for homosexual offences committed in private and attributed it to the differences in criminal procedure either side of the border. From at least this time (and perhaps even earlier) the policy of the Lord Advocate in Scotland was one of 'no prosecutions' against consenting male adults in private. This administrative discretion of the Lord Advocate lay at the very heart of the matter. It meant that although homosexual acts in private between consenting adults remained on the statute book as a criminal offence, the strict letter of the law was not being enforced. Supporters of

this discretion argued that prior to 1967 Scotland was actually in a more advanced position in relation to England, and that after 1967 it was at least on level terms. Opponents though, pointed out that such an arrangement not only brought the law into disrepute, but also placed homosexuals in Scotland at a disadvantage since it was not possible to guarantee that a 'no prosecutions' policy would be continued by future Lords Advocate. Whichever way it is viewed there can be no doubt that the interpretation of the law in this way by successive Lords Advocate was one of the main reasons why there was no parliamentary reform in the 1970s. There had been an *administrative* reform, but no *legislative* reform. And to a considerable extent the situation was compounded by the Sexual Offences Consolidation in 1976 which by bringing together a number of old statutes in one consolidated Act, reinforced the illogicality of maintaining an activity as a criminal offence, indulgence in which would not be liable to prosecution. This codification appeared to some as a modern 'endorsement' of an old law and was viewed as being at odds with the publicly stated policy of 'no prosecutions'.

The role of the individual MP was again of vital importance in eventually achieving reform. Both the Earl of Arran and Lord Boothby made influential contributions to the debate, but the principal actors were Leo Abse in the English context and Robin Cook in the Scottish. Although their influence on events was some thirteen years apart, there exists a quite remarkable parallel between the two men. While the respective reforms emerged under different procedural conditions it was largely through their quick-witted opportunism and political alertness that change was achieved. Both engaged in lengthy personal campaigns to keep the issue alive in Parliament and both encountered the same type of hostile opposition. This opposition desperately wished to remove the issue from the agenda, but only succeeded in revealing its prejudices and anxieties about the subject. Both Abse and Cook handled such opposition with similar style and wit to keep the tone of the debate as calm and as unemotive as possible, and in so doing managed to shape a climate of opinion conducive to reform.

Parliamentary procedure was another factor which influenced the outcome of homosexual law reform both north and south of the border. As with the divorce issue, the granting of extra parliamentary time for debate by the 1966-70 Labour administration was crucial to the success of the English reform. However, no such extra time was forthcoming in the 1970s for worthy Private Members' legislation from either Conservative or Labour administrations. Consequently, the reform procedure in Scotland was nothing if not novel. With no one in successive Ballots apparently prepared to take up the issue, with the repeated failure to get the matter off

the ground through the Ten-Minute Rule procedure and with Bills introduced in the Lords failing through time, Robin Cook ingeniously put a reform clause into the middle of a Government Bill – the Criminal Justice (Scotland) Bill. This caused not a little controversy, but it was nonetheless procedurally in order. While the Secretary of State, George Younger, questioned whether it was the most appropriate way to legislate on the issue, he had little option but to accept the situation and declare a free vote, although not before he had obliquely directed members of his own party not to vote for this clause. While this put some pro-reform Conservatives in an embarrassing position it did not seriously hamper the progress of the measure which was carried comfortably by 205 votes to 82 (of which there was a Scottish majority of 34 votes to 16 also in favour).

When comparisons are drawn between Scotland and England there are not many differences to be found in the general principles of the respective enactments. As in the case of divorce, the same considerations applied: should Scotland be content to 'catch up' and draw itself into line with prevailing practice in England or should it consider alternative policies to meet its own particular requirements? Glimpses of alternative policies did appear, for instance, in the proposal to reduce the age of consent the heterosexual norm of 16, but in the end the 'standardisation' approach prevailed, probably because homosexuality is not a subject which most MPs feel inclined to be radical about.

The glaring difference between the reforms, of course, was that they were thirteen years apart. Certainly in Abse's case parliamentary opinion was more definitely formed on the issue and once he could demonstrate support he was able to extract parliamentary time from a sympathetic administration. Roy Jenkins, the Home Secretary of the period, defended the allocation of parliamentary time thus:

'Had we not taken this course, we should have found ourselves faced with the anomaly that the sanction of the criminal law continued to apply to acts which Parliament no longer considered to be criminal and that solely because of the hazards of the Private Members' Bill procedure the law could not be changed'.⁽³⁰⁾

However, to all intents and purposes that was the situation which prevailed in Scotland throughout the seventies. The ultimate irony was that while the anomaly was used to justify parliamentary time for reform south of the border, in the Scots instance that very anomaly (an extant criminal statute but a policy of 'no prosecutions') was subsequently used to deny the need for reform and to justify what was tantamount to a 'non-decision'

IV Conclusion

One of the ideas that the case studies have tried to illustrate is that the making of policy is both an intellectual activity and an institutional process. All three cases have shown that decisions which influenced policy were the products of individual minds which perceived and defined problems and created new policies on the basis of those perceptions. Yet policy was also an institutional process whereby policy-makers derived authority from, and had to operate within, the political institutions of which they were a part. The cases of divorce and homosexuality in particular have demonstrated that while policy did alter as a response to intellectual appraisal, institutional realities also affected the extent to which new ideas penetrated the political world and upon the way in which they were assimilated into public policy.

In these cases parliament and individual MPs have had a rather more important role to play in deciding policy options than the 'rubber stamp' role with which they are usually associated. In this regard the studies, being both issues of conscience and issues of the 1970s, tend to support Norton's view that Parliament is not always impotent in influencing policy outcomes. The innovative roles of Robin Cook and Leo Abse are particularly good examples of Norton's idea that channels of influence already exist within parliament but that these channels are only effective if MPs show themselves willing (and knowledgeable enough) to use them.

However, even Norton concedes that Parliament has ceased to form a regular part of the decision-making process. Ashford's thesis then, is not necessarily refuted by these instances as they could be incorporated into his analysis as reasonable exceptions. What Norton's account does illustrate is that the Opposition in the seventies, because of the changing balance of power, had a greater opportunity to intervene in law-making and policy choices. In other words it shows that through dissent government action could be *prevented*. What these cases have tried to demonstrate are some of the difficulties involved when parliament tries to *initiate* policy change or legislation in face of a reluctant Executive. So it would appear as though the power of veto comes more readily to Parliament than the power of initiative. Yet, however limited it may be, Parliament did exert and still does exert some influence in the decision-making process. As Norton comments, 'the House of Commons certainly cannot be written off as irrelevant'.⁽³¹⁾

Finally, the studies have gone some way in illustrating how the Scottish

'political system' can be both dependent and independent within the larger British political system. It can be seen that there are times when Scotland can act independently to formulate policies to meet its own particular domestic requirements, but that even when it does so there still remains an element of dependence both in its demands upon parliamentary time and in the need to conform by and large to similar policies south of the border. There is then, in Scottish history, politics and culture a distinctive dualism which has prompted from Tom Nairn the graphic description that Scotland is really 'an unclassifiable marginal aberration'.

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